

November 5, 2004

Administrative Letter 2004-07

TO: All Agencies and Insurers Licensed to Write Title Insurance in Virginia

RE: Unfair Discrimination and Rebating Applicable to Title Insurance

NOTE: EACH INSURER RECEIVING THIS ADMINISTRATIVE LETTER IS INSTRUCTED TO PROVIDE A COPY TO EACH OF ITS CURRENTLY APPOINTED AGENTS, AND TO EACH NEWLY APPOINTED AGENT COMMENCING IMMEDIATELY.

On March 19, 2003, the Bureau issued Administrative Letter 2003-03 pertaining to a market practice in which a title insurer was issuing new price schedules to certain appointed agents, while other appointed agents of the company were allowed to continue to sell policies using the old price schedules. Administrative Letter 2003-03 stated that the Bureau considered this market practice to constitute unfair discrimination. The Bureau has received numerous questions from the title insurance industry regarding how the letter applied to other pricing practices such as bidding, negotiating, discounting or forfeiting of title insurance premiums. The Bureau has continued to evaluate issues relating to title insurance pricing practices, including the issue of rebating.

The standards for title insurance risk rates are set forth in § 38.2-4608 of the Code of Virginia and require that title insurance risk rates (i) be reasonable and adequate for the class of risk to which they apply and (ii) not be unfairly discriminatory between risks involving essentially the same hazards and expense elements. Section § 38.2-509 of the Code of Virginia prohibits rebating by insurers and agents. In an effort to provide guidance to the title insurance industry, this administrative letter sets forth the Bureau's position regarding the scope of its regulatory authority over title insurance risk rates, rebating and other similar practices in a series of questions and answers, which address many of the questions posed by the industry:

1. For the purposes of title insurance risk rates, what constitutes unfair discrimination?

Based on the provisions of § 38.2-4608, "unfair discrimination" in title insurance occurs where risks are charged a different rate when there is essentially no difference in the hazards insured against or when there is no difference in the expense elements presented by the risks. The Bureau would consider bidding, negotiating, discounting or forfeiting of all or part of the title insurance premium for competitive purposes to constitute unfair discrimination and rebating if such practices result in risks being charged different rates and there is no difference in the hazards or expenses associated with the risks.

2. How will the Bureau determine that unfair discrimination or rebating has occurred?

The Bureau will review the company's price schedules (or any other means by which the company communicates its prices) to determine whether unfair discrimination has occurred. While Chapter 46 does not specifically require that price schedules be issued or published, the business of title insurance cannot be conducted without issued or published prices. Once a title insurer makes its prices available, the prices become "published" regardless of the method used to communicate the prices. Section 38.2-4608 essentially establishes a system of "publish and use" for title insurance risk rates. The Bureau's analysis would be similar in determining whether a violation of § 38.2-509 has occurred.

3. What documentation or evidence does an insurer need in order to demonstrate compliance with Virginia law or demonstrate the differences between classes of risks?

Insurers should rely on § 38.2-4608 for guidance in making such determinations. For example, the statute contemplates risks being grouped into classes for the establishment of rates. Many title insurers establish classes or risks such as commercial versus residential and new policies versus re-issued coverage. Using re-issued coverage as an illustration, title insurers often charge less for title insurance policies when the transaction involves a mortgage re-finance and an insured with an existing title insurance policy on the property. In order to justify the re-issue rate, the title insurer would need to be able to establish and document a reduced level of exposure to loss or a reduced level of expense associated with the underwriting of such risks. In addition, the insurer would have to use the re-issue rate in all similar transactions.

In addition, § 38.2-4608 B allows insurers to price title insurance policies that are "unusually hazardous." The statute defines such situations to be risks with an "alleged defect or irregularity in the title insured or because of uncertainty regarding the proper interpretation or application of the law involved." Insurers are permitted to distinguish individual risks for pricing purposes based on this provision. However, the insurer would need to specifically document the qualities of the risk that warrant pricing other than the company's published pricing schedules.

4. Does the Bureau intend to promulgate requirements or standards outlining the level of information sufficient to establish compliance with § 38.2-4608?

No. It is the insurer's obligation to demonstrate to the Bureau that characteristics used to price or differentiate among classes of risks are specific, documented and representative of the difference(s) in the hazards or expense elements presented by the risk or classes of risks.

5. Are there any exceptions to the statutory provisions for adhering to published prices?

Yes. Subsection B of § 38.2-4608 allows insurers to price for unusually hazardous conditions involving alleged defects or irregularities in the title insured or because of uncertainty regarding the proper interpretation or application of the law involved.

6. How will the Bureau enforce the consistent application of an insurer's published rates and the rebating statutes?

Enforcement will be accomplished through on-site or target market conduct examinations, consumer/industry complaints and/or agent investigations.

Insurers and agents will be expected to retain information sufficient to establish the consistent application of pricing schedules. Insurers will be expected to be able to produce evidence sufficient to establish compliance with the rate standards for the company's pricing schedules and pricing practices.

7. Are insurers permitted to grant risk-specific discounts or to develop a rating plan for determining risk-specific discounts for competitive purposes?

No. Chapter 46 of Title 38.2 of the Code of Virginia does not set forth a means by which to allow insurers to provide risk-specific discounts. In other words, a title insurer would not be permitted to discount its published rates for an individual risk in order to reduce the premium for competitive purposes. Further, discounts or any plan for establishing risk-specific discounts would constitute unlawful rebating pursuant to § 38.2-509.

8. Is it permissible for an insurer with a risk valued, for example, at \$1,500,000, to have a published rate of \$1.00 per \$1,000 for values up to \$1,000,000 and then charge \$0.50 per \$1,000 for the additional \$500,000 in value?

The title insurer must be able to demonstrate that the higher amounts of coverage warrant a lower rate. In addition, the title insurer's published price schedules must reflect such differential and the differential must be used consistently with all such risks.

9. Is it permissible for an agent to forfeit all or a portion of his/her title insurance commission in order to reduce the premium owed by the insured?

No. The provisions of § 38.2-509 prohibit rebating.

10. May settlement agents give discounts, rebates, or other credits to property purchasers at settlement?

Section 38.2-509 prohibits title agents and insurers from giving credits, discounts or rebates if such credits, discounts or rebates are used to induce the purchase of an insurance contract. For example, there cannot be a requirement that the property purchaser buy a title insurance policy from the settlement agent in order to receive a credit, discount or reduction in closing costs. Administration Letter 1992-6 should be reviewed for further clarification.

11. What are the consequences for violating §§ 38.2-4608 or 38.2-509?

Sections 38.2-218 and 38.2-219 outline monetary penalties for violations of certain statutes. In addition, restitution may be ordered and other regulatory actions affecting the individual's or entity's license to transact business in Virginia may also be warranted.

Questions regarding title insurance rate standards should be directed to Rebecca Nichols, CPCU, CIC, AIE, Principal Insurance Market Examiner, Property and Casualty Division - Personal Lines Forms and Rates Section, at (804) 371-9965 or by email at rnichols@scc.state.va.us. Questions regarding rebating should be addressed to Steve Shipman, CISR, Senior Investigator, Property and Casualty Agent Investigation Section, Agent Regulation and Administration Division, at (804) 371-9465.

Sincerely,

Alfred W. Gross
Commissioner of Insurance